SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 168

FREDERICK C. OVERBURY,

Petitioner,

vs.

JOHN W. PLATTEN AND KINTZING P. EMMONS, INDIVIDUALLY AND AS EXECUTORS AND TRUSTEES OF AND UNDER THE WILL OF CHARLES L. DENISON, DECEASED.

BRIEF IN SUPPORT OF PETITION.

Opinions.

The opinion of the District Court was given orally by Judge William Bondy and will be found in the record at page 67. It does not appear to have been reported. The opinion of the Circuit Court of Appeals (Circuit Judges L. Hand, Augustus N. Hand and Clark, Judge L. Hand writing) was filed December 18, 1939 (R. 116). It is reported in 108 F. (2d) 155.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of

February 13, 1925, C. 229 (43 Stat. 938 [28 U. S. C. A. Sec. 346]) and under the proceedings taken herein and set forth in the petition at page 1.

The Facts.

The facts are stated in the petition at page 2. We emphasize the following, repeating record references for convenience of the Court:

1. That respondents procured the attachment in November, 1935 (R. 57-60, 105 f. 314).

2. That they served their notice of readiness to perform the contract and demanded performance by petitioner in March, 1936 (Ex. 4, R. 74, fols. 221-2; R. 30).

3. That performance by petitioner meant payment or due tender of $52,322.59 (Ex. 5, R. 76, f. 228; R. 30).

4. That performance by respondents meant delivery of 200 shares of Aluminum stock which they had agreed to sell for so much, and the surrender of 1,574 shares of Flintkote which they held as pledge (Ex. 1, R. 70, fols. 208-9; R. 29).

5. That petitioner made due tender of performance on March 19, 1936, and demanded the delivery of the 200 shares of Aluminum stock and the surrender of the 1,574 pledged Flintkote stock (Ex. 5, R. 76, 30) which he had a legal right to do. (*Halpin* v. *Phoenix Insurance Co.*, 118 N. Y. 165, 177).

6. That respondents rejected the tender and thereafter and on March 25, 1936, sold 500 shares of the pledged Flintkote and voluntarily delivered the remaining 1,074 shares to the Sheriff (Ex. D, R. 92, 31).

ARGUMENT.

I. Notice of Readiness Implies Ability to Perform.

It is petitioner's claim that when respondents gave notice of readiness and unconditionally demanded that petitioner perform on a day certain, to wit, March 19, 1936, they made a binding representation that if petitioner paid $52,322.59 they would deliver to him 200 shares of Aluminum stock and return to him his pledged 1,574 shares of Flintkote stock.

This appears to be the rule in *Peck* v. *Collins*, 70 N. Y. 376, 382.

Petitioner claims further that when he made tender of the exact amount respondents required of him at the time and place specified in their notice, that act was not in default of his contract, and did not discharge respondents from their duty.

This appears to be sustained in the case of *Mansfield* v. *N. Y. C. & H. R. R. R. Co.*, 102 N. Y. 205, 211, and in "Restatement of the Law of Contracts" given in *Amies* v. *Wesnofske*, 255 N. Y. 156, 163.

The Circuit Court of Appeals has held in this case that "the lien (of the attachment) was valid at the time of their refusal" (R. 119) on March 19, 1936, and by inference excused their refusal, notwithstanding respondents' notice that they would perform if petitioner performed, and notwithstanding the legal implication that no obstacle known to them stood in their way, or if there was such they would remove it. Hence this decision is probably in conflict with decisions in the highest court of New York, and with Contract Law on notice and demand, and the vital interest of persons in general and of business people in particular requires these questions to be clarified by this Court.

II. A claim in litigation is not an established debt, and defending a claim is not an act by a party to an independent contract which prevents performance or excuses non-performance of the contract by the other party.

The attachment was the act of the obligors in the Aluminum contract with the obligee (R. 57-60).

Defending the Kings County action on its merits was the act of the obligee.

Time for performance of the contract was fixed by the obligors with knowledge, i.e. that the attachment was in force and that respondents intended not to perform because of it, and that the Kings County action was undetermined (Ex. H, R. 108, fols. 322, 324; 48. Ex. 4, R. 74, fols. 222, 225; 30. R. 41, f. 122. R. 20, f. 60).

Under such conditions, may it be said that defending the action in Kings County was such an act of petitioner as prevented respondents as matter of law from performing their contract?

The Circuit Court of Appeals, however, has held in substance in this case that election by petitioner to defend an action, instead of paying the sum demanded when the action was commenced, amounted to a refusal to pay a separate and established debt, and that "the consequent prevention of delivery (i. e., of the Flintkote stock on March 19, 1936) must be attributed not to him (meaning respondents) but to the buyer" (petitioner) (R. 119).

Petitioner believes on that interpretation of the law of contract, any claim, however groundless, may be treated by the claimant as an established debt, and defending it may be penalized, and that any party who is dissatisfied with a contract may force the other party to pay an improper independent claim or forfeit his rights under the contract.

The decision of the Circuit Court of Appeals in this case appears to mean just that, and it requires no citation of

authority or calls for no argument to satisfy this Court that such a rule of law should be reviewed.

III. A question of good faith is one of fact for the jury and not of law for the court.

The Circuit Court of Appeals has held in substance in this case, after verdict directed by the trial Judge, that respondents acted in good faith in procuring the attachment and in ignorance of its invalidity (R. 118).

The record shows that the attachment in the Kings County action in the name of Farley was procured by respondents and at their expense (R. 57-60). That the same attorneys acted for respondents and for Farley (R. 75, f. 125; 100, f. 299).

That no mention was made of the attachment in respondents' notice of readiness and demand for performance (Ex. 4, R. 74-75; 30).

That under instructions from the attorneys no inventory of the property attached was made or filed (Ex. 9, R. 82; 60).

That the warrant was not filed until three years after it was granted (Ex. F, R. 104, f. 310; 47).

Martin v. *Central Vermont R. R. Co.* (50 Hun. 347, 353). "It is difficult to have justice done where the same attorneys appear for both parties in the litigation, and thus enable both parties to combine to take property from a third person who has not notice of the proceeding."

Petitioner claims the right under the Seventh Amendment of the Constitution and under the decisions (*e. g., Texas & Pacific Railway Company* v. *Cox*, 145 U. S. 593, 606; *McCarthy* v. *New York, N. H. & H. R. Co.*, 240 F. 602, 608 [2nd Circuit]), to have these facts and all inferences that might be drawn from them passed upon by the jury.

Petitioner claims further that the Circuit Court of Appeals erred in not reversing the judgment and allowing

a new trial, since it appears from the court's opinion that if a jury had determined, on any view which could be properly taken of the facts, that respondents or their attorneys had *not* acted in good faith or were *not* ignorant that the writ was irregular, the appeal would have terminated differently.

Conclusion.

The questions which this application suggests should be definitely settled by this Court. The decision of the Circuit Court of Appeals herein is probably both in conflict with decisions in the highest court of the State of New York, and contrary to sound principles of the established law of contracts of this country.

Dated June 11, 1940.

Respectfully submitted,

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